In The

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-501

MICHAEL D. MICHAEL,

Petitioner,

— against —

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent.

PETITION FOR A WRIT OF CERTIORARI to The Appellate Division, Supreme Court of New York, Fourth Judicial Department and Brief in support thereof.

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PETITION.

IN THE SUPREME COURT OF THE
UNITED STATES
October Term, 1979

No.

MICHAEL D. MICHAEL,
Petitioner,

-against-

THE PEOPLE OF THE STATE OF NEW YORK,
Respondent.

1. Petition for Writ of Certiorari to the Appellate Division, Supreme Court of New York, Fourth Judicial Department.

TO the Honorable Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States.

SUMMARY STATEMENT OF MATTER INVOLVED

Your petitioner entered a plea of guilty and was sentenced on the 8th day of September, 1978. On appeal to the Appellate Division, Supreme Court of New York, Fourth Judicial Department, the Judgment was affirmed. An application for leave to Appeal to the Court of Appeals was denied without opinion on the 26th day of June, 1979.

The Order of the Appellate Division, Supreme Court of New York, Fourth Judicial

Department recites that,

"It is hereby ordered, that the judgment so appealed from be, and the same hereby is unanimously affirmed.

Memorandum, which is hereby made a part hereof."

The Memorandum decision recites that:

"Appellant was stopped at 2:30 a.m. because the arresting officer observed his vehicle swerving from one side of the road to the other. The officer stated that he noted appellant's fumbling efforts to locate his license and registration, the very strong smell of alcohol on his breath and, upon exiting the vehicle, his unstable walk, based on these facts, appellant was arrested for Driving While Intoxicated. A subsequent breathalyzer test showed .21% blood alcohol.

Appellant argues that Section 501 (Subdivision 1, Paragraph C) of the Vehicle and Traffic Law which provides for a "detachable" "record of conviction stub" that "shall not be subject to inspection" by police, conferred upon him a constitutional right of privacy which was violated in that case. We assume, as did the Trial Court, that the arresting officer communicated on his radiotelephone at the scene and learned that ap-

pellant had a previous DWI conviction. This assumption is founded on the fact that the appearance ticket issued in this case alleged a violation of Section 1192, Subdivision 3 of the Vehicle and Traffic Law as a "felony." We do not find that the section was violated under the circumstances of this case. Here appellant was not required to and did not in fact exhibit his record of conviction stub to the arresting officer. Inasmuch as the provisions of this section of the Vehicle and Traffic Law "are restricted to those matters specifically mentioned therein" (PEOPLE VS. DAWLEY, 19NY2d 663, 664), the conviction is affirmed."

DETAILS OF THE CRIME

On the 3rd day of November, 1977 at approximately 2:25 in the forenoon of said day, Officer Shue of the police department of the Village of North Syracuse, New York, who was then and there driving northerly along Rt. 11, observed the defendant driving southerly along Rt. 11 in the area in front of the Main Street Elementary School. Thereafter, Officer Shue turned the vehicle he was operating around and followed the defendant for a short distance after which he signaled for the defendant to stop, which the defendant did forthwith.

Thereafter, Officer Shue demanded the defendant's operators license and registration which were given to the officer. The defendant did not give the officer that portion of his operators license that contained his record of convictions. Officer Shue returned to his patrol vehicle he was operating and was observed by the defendant to be in radio communication with a party unknown to the defendant. After such communication, Officer Shue returned to the defendant's vehicle and informed the defendant that he, the defendant, had a previous arrest for Driving While Intoxicated and issued to the defendant a Uniform Traffic Ticket which accused the defendant of Driving While Intoxicated, in violation of Section 1192, Subdivision 3, of the Vehicle and Traffic Law. The traffic ticket contained the notation (felony). The defendant was also issued a Uniform Traffic Ticket for failing to keep right, in violation of Section 1120-A of the Vehicle and Traffic Law.

The defendant moved to suppress all evidence obtained by Officer Shue subsequent to the time that he, Officer Shue, apparently obtained defendant's record of conviction by means of radio communication which motion was denied.

The case regularly came on for trial that resulted in a hung jury. Thereafter, de-

fendant entered a plea of guilty to a reduced charge of Driving While Intoxicated as a misdemeanor in violation of Section 1192, Paragraph 3, of the Vehicle and Traffic Law and appealed from the judgment entered upon the plea of guilty and from the order denying his motion for suppression.

GROUNDS UPON WHICH JURISDICTION OF THIS COURT IS INVOKED

It is respectfully submitted that this court has jurisdiction of this petition for Certiorari under Section 207 (B) of the Judicial Code as amended by the act of February 12, 1925, Section 1, 28 U.S.C., being one to review the final judgment of the Appellate Division, Supreme Court of the State of New York, Fourth Judicial Department, the highest Court of Appeals of the State of New York in which a decision could be had, rendered June 1, 1979.

The judgment affirmed a judgment of conviction and as certified the constitutional questions were considered and necessarily decided.

QUESTIONS PRESENTED

1. Do the individual rights protected by the 4th Amendment include control by the

individual of release of an individuals governmentally maintained driving record?

2. Does the due process clause of the 14th Amendment prohibit the use of one's driving record as a basis for an arrest for violation of Section 1192, Subdivision 2 and 3 of the Vehicle and Traffic Law of the State of New York?

REASONS RELIED UPON FOR THE ALLOWANCE OF THE WRIT

The Appellate Division, Supreme Court of the State of New York, Fourth Judicial Department, has decided a federal question of substance in a way not in accord with the applicable decisions of this court in that the Appellate Division, Supreme Court of the State of New York, Fourth Judicial Department, has affirmed a ruling by the trial court that a search by means of radio of the defendant's driving record between the time of initial detention and formal arrest did not constitute an unlawful search and seizure contrary to the prohibition of the 4th Amendment to the Constitution of the United States of America and that, although the defendant was unable to cross examine the arresting officer with respect to the reliance the officer placed upon the defendant's previous driving

record in determining whether or not to make the arrest without putting such driving record before the jury for consideration with respect to the issue of guilt or innocense of the crime charged, the defendant was not deprived of his rights without due process of the law.

The position of the petitioner is that it is unreasonable to allow radio-computer search and seizure of one's driving record simultaneously with detention of the individual and to predicate to any extent the arrest of the individual upon the results of such contemporaneous search and seizure. Further, the defendant contends that because of the procedure utilized he was prevented from fully testing the credibility of the arresting officer before the jury at the time of trial. In sum, the defendant was denied the basic right of freedom from unreasonable search and seizure and denied the basic right to cross examine his adversary.

To support his position, the defendant releis upon the following cases:

KATZ V. UNITED STATES, 389 U.S. 347
JOHNSON V. UNITED STATES,1948, 333 US. 10
BARBER V. PAGE, 390 U.S. 719
BROWN V. MISSISSIPPI, 297 U.S. 278, 286

CHAMBERS V. MISSISSIPPI, 410 U.S. 284

HOFFA V. UNITED STATES, 1966, 293 U.S. 293

DAVIS V. MISSISSIPPI, 1969, 394 U.S. 721

WHEREFORE, your petitioner MICHAEL D. MICHAEL, prays that a Writ of Certiorari may issue out of and under the seal of this court, directed to the Appellate Division, Supreme Court of New York, Fourth Judicial Department, commanding the said court to certify and serve on this court for review and determination, as provided by law, this cause and a complete transcript of the record and all proceedings had herein, and that the order of the Appellate Division, Supreme Court of New York, Fourth Judicial Department, affirming the judgment in this cause may be reversed and that the petitioner MICHAEL D. MICHAEL may have such other and further relief in the premises as this court may deem proper.

Dated:

_____Petitioner

_____Counsel For
Petitioner

CERTIFICATE OF COUNSEL.

STATE OF NEW YORK)
)ss.:
COUNTY OF ONONDAGA)

I hereby certify that I have examined the foregoing petition for a Writ of Certiorari and that in my opinion it is well founded and the cause is one in which the petition should be granted.

_____Counsel for
Petitioner

IN THE SUPREME COURT OF THE
UNITED STATES
OCTOBER TERM 1979

No.

MICHAEL D. MICHAEL,
Petitioner,

-against-

THE STATE OF NEW YORK,
Respondent.

BRIEF IN SUPPORT OF PETITION FOR CERTIORARI

The opinion of the Appellate Division, Fourth Judicial Department of the Supreme Court of the State of New York, not yet reported, appears in the appendix hereto. No opinion was handed down by the Court of Appeals of the State of New York on the denial of motion for a certificate of Leave to Appeal to the Court of Appeals. The certificate denying leave to appeal to the Court of Appeals appears in the appendix hereto.

STATEMENT OF JURISDICTION AND QUESTIONS PRESENTED AND THE FACTS

The statement under which the Jurisdiction of this Court is involved, of the questions presented, and the factual matter relative to this application appear in the petition to which this brief is annexed.

ARGUMENT

The petitioner urges that he has been convicted of the crime of operating a motor vehicle while intoxicated in violation of Section 1192, Subdivision 3, of the Vehicle and Traffic Law of the State of New York and sentenced as a result of an arrest, a search and seizure and a procedure so violative of the protection of his constitutional rights as to be a denial to him of the protection of the 4th and 14th Amendments to the Constitution of the United States.

POINT I

THE QUESTION INVOLVED HERE IS WHETHER OR NOT INDIVIDUAL RIGHTS PROTECTED BY THE 4th AMENDMENT INCLUDE CONTROL OF RELEASE OF THE INDIVIDUAL'S GOVERNMENTALLY MAINTAINED DRIVING RECORD.

Certain it is that one does not lose all reasonable expection of privacy because automobile use is subject to governmental regulation. DELAWARE V. PROUSE, 99 S. Ct. 1391. KATZ V. UNITED STATES, 389 U.S. 347, holds that the breadth of the protection of the 4th Amendment is determined by examination of the thing claimed to be protected and not by the place where the thing is located. Therefore, the fact that the individual's driving record is housed in a governmental

office or computer bank is not determinative of the question of whether or not release of one's driving record falls within the protection of the 4th Amendment. According to the KATZ case, Supra, the question of whether or not the thing in question is covered by the 4th Amendment is by determination of whether or not the individual could reasonable assume that it would be protected. The KATZ case, supra, mandates close examination ofthe thing.

Examination of one's driving record, reveals, without question, that it is a part of the individual. Without a being having been, an individual record does not exist. Since the 4th Amendment "protects people," KATZ case, supra, the question is, is this a part of the person that is protected and the fact that gaining access to the defendant's record was done electronically "can have no constitutional significance?" KATZ case, supra, P. 353.

Could the defendant reasonably assume that his driving record would be protected from electronic seizure by the arresting officer? It would seem that, in spite of the Court of Appeals strict construction of Section 504, Paragraph 1, of the VEHICLE AND TRAFFIC LAW of the State of New York, PEOPLE V. DAWLEY, 19NY2d 663,664, the mandatory prohibitive language of the statute dictates an affirmative answer.

Especially is this true considering the fact that the defendant's record of conviction stub which he did not give to the arresting officer at the time of his apprehension was issued by the state with the provision that it did not have to be presented to a police officer. Appendix C. The state put in the pocket of the defendant the ground for reasonably believing that the police did not have access to his driving record at the time of his apprehension. HOFFA V. UNITED STATES, 385 U.S. 293, 381, 383. The question remains, was the search and seizure incident to a lawful arrest? This case presents electronic surveillance contemporaneous with the individual's arrest. It can "hardly be deemed an 'incident' of that arrest." KATZ case, Supra, P. 357. The surveillance wasn't even in the area of the defendant. DAVIS V. MISSISSIPPI, 394 U.S. 721, prohibits searches and seizures during "investigatory detentions." The officer searched during detention. In order to have probable cause for the arrest as a felony, the officer would have to have had knowledge of the defendant's previous conviction of Driving While Intoxicated prior to the detention. See Section 1192, Subdivision 5, of the VEHICLE and TRAFFIC LAW of the State of New York. Appendix D. However, to detain for the purpose of determining

Whether the commission of a lesser crime was being committed, all that the officer needed to possess was an articulable reason to believe that a crime was being committed. PEOPLE V. DE BOUR, 40 NY2d, 210; CRIMINAL PROCEDURE LAW of the State of New York, Section 140.10. Appendix E. DELAWARE V. PROUSE, 99 S. Ct. 1391. This, without the defendant's driving record, the officer apparently had, although some of the jurors at the time of trial, even absent cross examination with respect to reliance of the officer on the defendant's record for purpose of arrest, apparently did not believe the officer. Assuming that the officer did make a lawful detention of the defendant, the question is, should he be allowed to make an electronic survey of the detained person's record during detention? The answer would seem to be no. The probability is too great that arrest will be predicated on record and not on what the officer observes. An arrest for a moving violation or crime should be based only upon then observation unblurred by contemporaneously or after acquired knowledge of the operators past record.

POINT II

DUE PROCESS OF LAW MANDATES THAT ONE'S DRIVING RECORD NOT BE USED AS A BASIS FOR HIS ARREST FOR VIOLATION OF SECTION 1192, SUBDIVISION 2 and 3 OF THE VEHICLE AND TRAFFIC LAW OF THE STATE OF NEW YORK.

Secreted in the trial procedure of one accused of operating an automobile while intoxicated as a felony in violation of Section 1192, Subdivision 2 and 3 of the Vehicle and Traffic Law of the State of New York when one's record is used as a part of the basis for the arrest is an obstacle to the constitutional right of cross-examination. The procedure followed in the State of New York is to try the issue of operating while intoxicated with respect to the current accusation and, if the defendant is found guilty, to then give the defendant the opportunity to admit or deny the previous conviction claimed, and if it is denied, to try the issue of whether or not the defendant was previously convicted of operating while intoxicated. Although, the initial issue is denominated as a felony, evidence of the previous conviction is not put before the jury so as not to prejudice the defendant with respect to the present accusation. Thus, without prejudicing the defendant, it is impossible to cross examine the arresting officer with respect to

the degree the defendant's record was utilized by the officer in determining whether or not to arrest. The officer's credibility with respect to observations at the time of arrest cannot be fully explored.

At the time of oral argument in the Appellate Division and on oral argument before associate Justice Jones for permission to appeal to the Court of Appeals, the suggestion was made that such exploration could be made absent the jury and defendant's rights reserved. The problem with the suggested procedure is that the main function of the Jury, determination of credibility of the witness, is removed from the jury. It is Legion, that it is the constitutional right of the defendant to have the opportunity to cross examine the witnesses against him. See BARBER V. PAGE, 390 U.S. 719; CHAMBERS V. MISSISSIPPI, 410 U.S. 284.

CONCLUSION

Calm review of this case reveals that basic rights of the defendant were denied and a Writ of Certiorari should be issued to review the judgment of the Appellate Division, Supreme Court of New York, Fourth Judicial Department.

Respectfully submitted,

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Attorney for Petitioner

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APPENDIX

APPELLATE DIVISION, FOURTH JUDICIAL DEPARTMENT ORDER.

379

SUPREME COURT OF THE STATE OF NEW YORK

APPELLATE DIVISION, FOURTH JUDICIAL DEPARTMENT

PRESENT: DILLON, P.J., CARDAMONE, SCHNEPP, DOERR, MOULE, JJ.

People of the State of New York, Respondent,

vs.

Michael D. Michael, Appellant.

The above named Michael D. Michael, defendant

having appealed to this Court from a judgment of the Onondaga County Court, entered in the Onondaga County Clerk's office on September 8, 1978 and said appeal having been argued by, John Henry of counsel for appellant, Gail Uebelhoer of counsel for respondent,

and due deliberation having been had thereon,

It is hereby ORDERED, That the judgment so appealed from be, and the same hereby is unanimously affirmed.

Memorandum, which is hereby made a part hereof.

Entered: June 1, 1979

MARY F. ZOLLER, Clerk

MEMORANDUM

379. (Onondaga Co.) - People of the State of New York, Respondent, v. Michael D. Michael, Appellant. - Judgment unanimously affirmed. Memorandum: Appellant was stopped at 2:30 a.m. because the arresting officer observed his vehicle swerving from one side of the road to the other. The officer stated that he noted appellant's fumbling efforts to locate his license and registration, the very strong smell of alcohol on his breath and, upon exiting the vehicle, his unstable walk. Based on these facts appellant was arrested for driving while intoxicated. A subsequent breathalyzer test showed .21% blood alcohol.

Appellant argues that section 501 (subd 1, par c) of the Vehicle and Traffic Law which provides for a "detachable" "record of conviction stub" that "shall not be subject to inspection" by police, conferred upon him a constitutional right of privacy which was violated in this case. We assume, as did the trial court, that the arresting officer communicated on his radio-telephone at the scene and learned that appellant had a previous DWI conviction. This assumption is founded on the fact that the appearance ticket issued in this case alleged a violation of section 1192, subdivision 3 of the Vehicle and Traffic Law as a "felony". We do not find

that the section was violated under the circumstances of this case. Here appellant was not required to and did not in fact exhibit his record of conviction stub to the arresting officer. Inasmuch as the provisions of this section of the Vehicle and Traffic Law "are restricted to those matters specifically mentioned therein" (People v. Dawley, 19 NY2d 663, 664), the conviction is affirmed.

(Appeal from Judgment of Onondaga County Court, Sullivan, J. - Driving While Intoxicated.) Present: Dillon, P.J., Cardamone, Schnepp, Doerr, Moule, JJ.

COURT OF APPEALS CERTIFICATE DENYING LEAVE TO APPEAL.

STATE OF NEW YORK
COURT OF APPEALS

BEFORE: HON. HUGH R. JONES, Associate Judge

THE PEOPLE OF THE STATE OF NEW YORK,
Respondent,

-against-

Michael D. Michael,
Appellant.

CERTIFICATE DENYING LEAVE

I, HUGH R. JONES, Associate Judge of the Court of Appeals of the State of New York, do hereby certify that, upon application timely made by the above-named appellant for a certificate pursuant to CPL 460.20 and upon the record and proceedings herein, there is no question of law presented which ought to be reviewed by the Court of Appeals and permission to appeal is hereby denied.

Dated at Utica, New York
June 26, 1979

S/ HUGH R. JONES
Associate Judge

*Description of order: Order of Appellate Division, Fourth Department, dated 6/1/79, affirming judgment of County Court, Onondaga

County, rendered 9/8/78 (Conviction of violation of ¶ 1192 (3) of Vehicle & Traffic Law as a misdemeanor).

NEW YORK STATE VEHICLE AND TRAFFIC LAW SECTION 504, PARAGRAPH 1.

NEW YORK STATE

VEHICLE AND TRAFFIC LAW

¶ 504 Form of license

1. Every license or renewal thereof issued on or after September first, nineteen hundred seventy-six shall contain a distinguishing number or mark and adequate space upon which an anatomical gift, pursuant to article forty-three of the public health law, by the licensee shall be recorded and shall contain such other information and shall be issued in such form as the commissioner shall determine. The commissioner may provide adequate space on a detachable or separate part of such license, to be known as the "record of convictions stub," for the recording thereon of convictions as provided in section five hundred fourteen of this chapter and such record of convictions stub shall be detachable by the licensee and shall not be subject to inspection by any motor vehicle inspector, peace officer, state policeman or any other person, but shall be exhibited on demand only to a magistrate after conviction of the licensee or, at a hearing, to any person designated by the commissioner to conduct such a hearing. The license may also contain the photograph of the licensee, if required by the commissioner.

VEHICLE AND TRAFFIC LAW 1192.

VEHICLE AND TRAFFIC

¶ 1192. Operating a motor vehicle while under the influence of alcohol or drugs

1. No person shall operate a motor vheicle while his ability to operate such motor vehicle is impaired by the consumption of alcohol.

2. No person shall operate a motor vehicle while he has .10 of one per centum or more by weight of alcohol in his blood as shown by chemical analysis of his blood, breath, urine or saliva, made pursuant to the provisions of section eleven hundred ninety-four of this chapter.

3. No person shall operate a motor vheicle while he is in an intoxicated condition.

4. No person shall operate a motor vehicle while his ability to operate such a motor vehicle is impaired by the use of a drug as defined in this chapter.

5. A violation of subdivisions[1] two, three or four of this section shall be a misdemeanor and shall be punishable by imprisonment in a penitentiary or county jail for not more than one year, or by a fine of not more than five hundred dollars, or by both such fine and imprisonment.

¶ 1192

Note 1/2

A person who operates a vehicle in violation of subdivisions two or three of this section after having been convicted of a violation of subdivisions two or three of this section, or of driving while intoxicated, within the preceding ten years, shall be guilty of a felony. A person who operates a vehicle in violation of subdivision four of this section, after having been convicted of a violation of subdivision four of this section, or of driving while his ability is impaired by the use of drugs within the preceding ten years, shall be guilty of a felony.

Added L. 1970, c. 275, ¶3; amended L.1971, c. 495, ¶1; L.1972, c. 450, ¶ 1; L.1975, c. 154, ¶ 12.

[1]So in original.

NEW YORK STATE

CRIMINAL PROCEDURE LAW

¶ 140.10 Arrest without a warrant; by police officer; when and where authorized

1. Subject to the provisions of subdivision two, a police officer may arrest a person for:

(a) Any offense when he has reasonable cause to believe that such person has committed such offense in his presence; and

(b) A crime when he has reasonable cause to believe that such person has committed such crime, whether in his presence or otherwise.

AMENDMENTS 4 AND 14 OF THE CONSTITUTION OF THE UNITED STATES.

THE CONSTITUTION OF THE UNITED STATES

Amendment 4

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Amendment 14

Section 1

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.